

## Authority for Dismissing EEO Complaints pursuant to 29 C.F.R. § 1614.107(a)(1)

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### 29 C.F.R. § 1614.107(a)(1)

An agency must dismiss a complaint that:

fails to state a claim under 29 C.F.R.  
§1614.103 or 29 C.F.R. § 1614.106(a);  
or

states the same claim that is pending  
before or has been decided by the  
agency or Commission.

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### A Claim

To state a claim, the complainant must allege:

- s/he is an employee or applicant of  
the federal government
- who suffers present harm/is "aggrieved,"  
*e.g.*,
  - ✓ tangible harm to a term, condition or  
privilege of employment, or
  - ✓ harassment so severe or pervasive as to  
alter the conditions of employment
- because of a protected basis

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## Scenario #1

- CP, a newly appointed supervisor, is given a medical examination to determine fitness for the position. During the examination, the agency asks for CP's family medical history and determines CP's father has heart disease. As a result, CP is denied the supervisory position, and subsequently files a complaint.

- *Does CP have a valid claim?*

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## Employee/Applicant v. Contractor

For purposes of employment discrimination, Title VII does not cover contract employees, however

Whether an employee is a "contractor" depends on the extent of the authority and control the agency has over the individual.

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## Present Harm/Is Aggrieved - Tangible Harm

- Always assume what the complainant claims is true
- Harm must be based on some **agency** action or inaction affecting a term, condition or privilege of complainant's employment
  - <harm being claimed must be specific
  - <must claim more than a "generalized grievance" that affects an entire group of employees equally.

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## Scenario #2

CP filed a disability complaint claiming that he was forced to sign a Return to Work Agreement under threat of termination. Although CP had not missed any work, the Agreement required CP to continue visits with doctors, to deliver progress reports and a list of medications he was prescribed, and to undergo blood tests, all on a monthly basis. The Agreement also authorized the agency to discuss CP's condition with his medical providers.

*Has CP stated a tangible harm? A viable claim?*

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## Scenario #3

CP applied for a position as a Fishery Biologist with the National Oceanic and Atmospheric Administration. CP was disqualified from the position as advertised under the Vacancy Announcement, and files an EEO complaint claiming that he was subjected to discrimination on the basis of national origin, because he is not a U.S. Citizen.

*Discuss whether CP has stated a claim?*

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## Present Harm/Is Aggrieved Collateral Attacks

Alleging discrimination from matters that occurred in another forum's process are considered collateral attacks and do not state a claim. For example, filing a complaint:

- regarding the agency's delay in submitting Office of Workers' Compensation Program paperwork; or
- alleging discriminatory treatment by the Criminal Investigation Division during the course of an investigation; or
- alleging discriminatory collusion by agency and union officials in the grievance process.

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### Present Harm/Is Aggrieved - Harassment

- Assume what the complainant claims is true
- Consider all incidents of harassment together
- Incident(s) must be severe or pervasive
  - Sliding scale - less frequent the incidents the more severe they must be
  - Viewed from the perspective of a "reasonable person" in same circumstances
  - Psychological harm not necessary
- Dismissal only appropriate where there is no claimed set of facts that would entitle complainant to relief

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### Harassment and Verbal Altercations

- Verbal remarks without concrete action will generally not state a claim
- Extremely inflammatory remarks or communication may be considered harassment
- Claim must be raised on one of the eight statutorily protected bases
- Not a general civility code

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### Scenario #4

CP, a custodian, claims that he was harassed on the bases of race, religion, and sex when: 1) the Acting Distribution Supervisor, who is not CP's supervisor, gave him instructions and also reported him for an incident pertaining to excess water on the workroom floor, and 2) he noticed the letters "KKK" scratched on his timecard while clocking in.

*Discuss whether CP has stated a claim.*

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## Retaliation/Reprisal

The Commission has taken the position that the statutory anti-retaliation provisions prohibit any action that is based on a retaliatory motive and is likely to deter the employee or others from engaging in protected EEO activity. The actions need not materially effect the terms and conditions of employment. In general, protected activity comes in two forms - participation and opposition.

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## Scenario #5

CP was questioned during an internal investigation about whether she witnessed a supervisor's alleged sexual harassment. In response, CP described several instances of sexually harassing conduct by the supervisor. The employer took no action against the alleged harasser, but terminated CP soon after finishing its investigation. CP subsequently filed a claim of retaliation.

*Discuss whether CP's complaint states a claim.*

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## Security Clearances

The Commission is precluded from reviewing the validity of the requirement of a security clearance or the substance of a security clearance determination. The Commission may, however, review whether the grant, denial, or revocation of a security clearance was carried out in a discriminatory manner.

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### Scenario #6

Following CP's self-initiated fitness for duty examination, the agency began a review of CP's security clearance, and demanded medical information and documentation for the review. CP subsequently filed a formal complaint, claiming that he was subjected to discrimination based on disability.

*Discuss whether CP's complaint states a claim.*

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### States Same Claim Pending or Decided by Agency or EEOC

The present matter and the previous matter must be **identical**. To be considered identical, the matter in the previous complaint must involve:

- the same time
- the same place/location
- the same incidents
- the same parties

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### Scenario #7

CP filed a formal EEO complaint claiming that "on March 10, 2008 and subsequent dates," his requests for training were denied. Thereafter, CP filed a second complaint claiming discrimination on the basis of reprisal for prior protected EEO activity when on October 9, 2008 he was denied entry into a national competition due to his being denied training.

*How should the second complaint be handled?*

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## **Authority for Dismissing EEO Complaints pursuant to 29 C.F.R. §1614.107(a)(2)**

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## **29 C.F.R. § 1614.107(a)(2)**

An agency must dismiss a complaint:

- that fails to comply with the applicable time limits contained in §§ 1614.105 (EEO counselor contact), 1614.106 (formal complaint) and 1614.204(c) (class complaint), unless the agency extends the time limits, **or**
- that raises a matter that has not been brought to the attention of a Counselor and is not like or related to a matter that was brought to the Counselor's attention.

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## **Untimely EEO Counselor Contact**

- CP must initiate contact with an official logically connected with the EEO process with an intent to begin the EEO process within 45 days of the date of the alleged discriminatory event or the effective date of a personnel action or the complaint will be dismissed unless
- CP can show that s/he was not notified of the time limit

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### General Exception to Untimely Contact

The agency shall extend the time limit where CP shows that:

- s/he was not notified of the time limits and was not otherwise aware of them;
- s/he did not know and reasonably should not have known that the discriminatory event or personnel action occurred;
- despite due diligence s/he was prevented by circumstances beyond his/her control from contacting an EEO counselor within 45 days

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### Notice of Time Limit for Contact

- Agency may not dismiss where CP shows it did not notify him/her of time limit nor was s/he otherwise aware
- Agency may show constructive knowledge of time limit by showing that:
  - <EEO counselor information and time limit conspicuously posted in the CP's workplace; or
  - <CP received training or an orientation which specifically addressed the EEO process and time limit for counselor contact.

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### Reasonable Suspicion of Discrimination

- 45 day time limit is triggered by "reasonable suspicion" of discrimination
- "Reasonable suspicion" determined by the degree of permanency that the alleged discriminatory act has
- CP may not wait until all facts are gathered

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## Circumstances Beyond Complainant's Control

Agency may be barred from dismissing on timeliness grounds where the CP shows circumstances beyond his/her control prevented him/her from contacting an EEO counselor within 45 days. Circumstances include:

- physical or mental incapacity
- erroneous information from the EEO office

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## Scenario #1

- CP, a non-Federal employee, applied for an agency position, and in March became aware she had not been selected. In June she contacted an EEO Counselor, who told her that a complaint would likely be dismissed for untimely Counselor contact. CP responded that she was not notified of the time limits, and that it was unreasonable to expect her to "read, memorize, and understand all information posted" on her brief visit to the agency HR Office.
- *Discuss how this complaint should be processed.*

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## Hostile Work Environment Claims

Hostile work environment claims involve allegations of discrimination with respect to a series of employment actions and decisions. The actions and decisions are related in kind or character and *collectively* constitute a single "employment practice." So long as one of the actions or decisions in the *series* occurred within the 45 day period prior to EEO counselor contact, it may be combined with the other untimely actions and decisions outside of the 45 day period to make the claim actionable.

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### Formal and Class Complaint Time Limit

A formal or class complaint must be filed within 15 days of the CP's or class agent's receipt of the "Notice of Right to File a Complaint," or the agency may dismiss the complaint as untimely filed, pursuant to 1614.107(a)(2).

These time limits can also be extended.

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### Scenario #2

CP initiated EEO Counselor contact, and was eventually issued a Notice of Right to File (NORF), informing her that she had 15 days to file a formal EEO complaint. When CP asked the Counselor if the days were "calendar days or business days" the Counselor was unsure, while referring CP to another person for clarification. CP filed her formal complaint 15 business days after receipt of her NORF.

*Should CP's complaint be dismissed?*

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### Claim Not Brought to EEO Counselor Attention

- A claim should be dismissed if the CP did not bring it to the attention of the EEO counselor, **and**
- It is not like or related to claims that were presented to the EEO counselor

< claim adds to or clarifies the original claim(s) and could reasonably have been expected to grow out of the counseled claims.

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## Authority for Dismissing EEO Complaints pursuant to 29 C.F.R. § 1614.107(a)(3-4)

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### 29 C.F.R. § 1614.107(a)(3)

An agency must dismiss a complaint:

- that is or was the basis of a pending civil action in a U.S. District court in which the CP is a party provided at least 180 days have passed since the filing of the EEO complaint; or
  - that was the basis of a decided civil action in a US District court in which the CP is a party; and
  - where the incidents of discrimination are identical
- ✓ use factual allegations not just bases or requested relief to determine

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### Scenario #1

CP filed a formal EEO complaint claiming discrimination when on separate dates he was issued a seven-day suspension, a letter of warning, and placed in an off-duty non-pay status. Subsequently, CP filed a civil action in US District Court concerning his termination, as well as the underlying disciplinary actions that led to his termination. The District Court judge then issued an order in the civil action to “grant defendants motion to dismiss,” and “close the case.”

*Discuss whether CP’s complaint should be dismissed.*

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## 29 CFR§ 1614.107(a)(4)

An agency must dismiss a complaint:

- where the same matter has been raised in a negotiated grievance procedure that permits claims of discrimination; or
- where the same matter has been raised in an appeal to the Merit Systems Protection Board (MSPB); and
- indications are that CP has elected to use a non-EEO process.

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## Negotiated Grievance Procedure

Requirements for dismissal:

- CP filed a grievance in a procedure established pursuant to a collective bargaining agreement between the agency and a union representing its employees;
- grievance procedure provides for claims of discrimination to be raised in grievance procedure or the statutory EEO process, but not both;
- CP elected to pursue his/her allegations of discrimination in the grievance procedure, instead of the EEO process, **AND**
- grievance and EEO complaint involve identical matters.

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## MSPB Appeal

Requirements for dismissal:

- CP filed an appeal with the MSPB
- CP elected to pursue his/her claim with the MSPB, not the EEOC
- the MSPB appeal and the EEO complaint involve identical matters.

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## Scenario #2

CP filed an MSPB appeal concerning her termination on September 4, 2007. On October 13, 2007, complainant filed an EEO complaint concerning her removal, which the agency dismissed in its November 20, 2007 FAD because CP elected to file an appeal with the MSPB on the same matter. On December 18, 2007, the MSPB dismissed the mixed-case appeal for lack of jurisdiction.

*Discuss the proper handling of this complaint.*

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## Authority for Dismissing EEO Complaints pursuant to 29 C.F.R. § 1614.107(a)(5)

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### 29 C.F.R. §1614.107(a)(5)

An agency shall dismiss a complaint that:

- is moot; or
- alleges a proposal to take a personnel action or other preliminary step to taking a personnel action that is discriminatory.

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## **Mootness**

**A complaint is moot when:**

- 1. there is no reasonable expectation that the alleged violation will recur**
- 2. interim relief or events have eradicated the effects of the alleged discrimination**

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## **Moot -**

### **Request for Compensatory Damages**

**Where a complainant (CP) has requested compensatory damages, the agency **MUST** address the issue of compensatory damages before dismissing the complaint as moot.**

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## **Scenario #1**

CP, a USPS employee, timely filed a formal complaint on the basis of age when he was given a notice of seven-day suspension for unacceptable performance/failure to follow instructions. Asserting that the agency is trying to get rid of older employees, CP requests that he "receive everything I deserve" for the humiliation suffered. However, as a result of a grievance complaint filed on the same matter, the suspension is rescinded and removed from CP's records.

*How would you handle this complaint?*

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### **Proposal or Preliminary Personnel Action**

- An action which, standing alone, does not affect the individual's employment status will be dismissed unless the action in the claim is one of a pattern of harassing behavior by the agency
- A proposed action will merge with the final action when the agency acts on its proposal and the complaint must not be dismissed

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### **Scenario #2**

CP timely filed a formal EEO complaint alleging that she was subjected to discrimination on the bases of race, sex, color, disability, age, and in reprisal for prior protected EEO activity when she received a notice of proposed removal. CP also claimed that the agency then used the proposed removal to try to force her to accept a reassignment to a different position without commensurate pay.

*How should this complaint be handled?*

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